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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1216

THEODORE RISTAINO, ET AL — Petitioner

vs

JAMES ROSS, JR. — Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Ross, Jr., who is now held at the Massachusetts Correctional Institution at Norfolk, asks leave to file the attached Brief In Opposition To Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit, and to proceed in forma pauperis pursuant to Rule 53.

The Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Michael G. West, J.D.
Not a member of the Bar of this Court
Counsel for Respondent Below
In Forma Pauperis
31 Elm Street
Springfield, MA 01103

Kamberg
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attorneys at law

IN THE
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THEODORE RISTAINO, ET AL — Petitioner

vs

JAMES ROSS, JR. — Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, James Ross, Jr., being duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis

1. I am the Respondent in the above-entitled case, and am presently incarcerated in the Massachusetts Correctional Institution, Norfolk.

2. Because of my property, I am unable to pay the costs of such cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. I have proceeded below in both the state trial and appellate Courts and both Federal Courts in forma pauperis.

6. The nature of said cause is briefly stated as follows:

I was found guilty of indictments charging me with armed robbery, assault with a dangerous weapon, and assault and battery with intent to murder in the Superior Court of the Commonwealth of Massachusetts on July 2, 1970, receiving concurrent terms of 18 to 30 years for armed robbery, six to 10 years for assault with a dangerous weapon, and 18 to 20 years for assault and battery with intent to murder. During the voir dire to the prospective jurors I proposed questions to the judge concerning racial prejudice to ask the prospective jurors in order to insure a fair and impartial trial guaranteed me by the Constitution of the United States. The judge refused to ask these questions. I raised this same issue on appeal and the Supreme Judicial Court held that the trial judge's refusal to ask these proposed questions did not deny me any protections guaranteed me by the United States Constitution. Both the United States District Court for the District of Massachusetts (decision not yet reported) and the United States Court of Appeals for the First Circuit, 508 F. 2d. 754 (1974) have held that failure of the trial judge to ask proposed specific questions to the prospective jurors denied me my Constitutional rights. I allege that the trial judge's failure to ask specific questions to the prospective jurors violated this Court's decisions in Aldridge v. United States, 283 U.S. 308 (1931) and Ham v. South Carolina, 409 U.S. 524 (1973).

me James Ross Jr
JAMES ROSS, JR.

Sworn and subscribed to before me under the pains and penalties of perjury this 7th day of April, 1975.

Subscribed and sworn to before me this 7th day of April 1975.
Commonwealth of Massachusetts, County of Norfolk SS.

Charles E Rose
Notary Public

Kamberg Berman & Hendel, P.C.
attorneys at law

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October Term, 1974

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THEODORE RISTAINO, ET AL, Petitioners

v.

JAMES ROSS, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR JAMES ROSS, JR. IN OPPOSITION

MICHAEL G. WEST, J.D.
Not a member of the Bar of this Court,
Counsel for Respondent Below,
In Forma Pauperis

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IN THE
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No. 74-1216

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JAMES ROSS, JR., Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR JAMES ROSS, JR.
IN OPPOSITION

PRIOR PROCEEDINGS

ROSS was convicted by a trial jury in the Superior Court, Middlesex County, Massachusetts, and there is no opinion with respect to that conviction. The opinion of the Supreme Judicial Court of Massachusetts in Commonwealth v. Ross is reported in 1972

Mass. Adv. Sh. 873, 282 N.E. 2d 70. ROSS filed a timely petition to the United States Supreme Court, Misc. #72-5119, and on January 22, 1973, Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were granted, the judgment below vacated and the case remanded for further consideration in light of Ham v. South Carolina, 409 U.S. 524; Ross v. Massachusetts, 410 U.S. 901 (1973). Subsequently, a second opinion was rendered affirming ROSS' conviction by the Supreme Judicial Court for the Commonwealth of Massachusetts and is reported in 1973 Mass. Adv. Sh. 839, 296 N.E. 2d 810, and is reprinted in App. A pp. 38-46. ROSS again filed a timely Petition for Writ of Certiorari to the United States Supreme Court, which petition was denied on December 3, 1973, with Mr. Justices Marshall, Douglas and Brennen dissenting and is reprinted in the App. A pp. 47-52 Ross v. Massachusetts, 414 U.S. 1080 (1974). ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts. On June 24, 1974, the Honorable Walter Jay Skinner, after a hearing, issued a memorandum and order stating that:

> "The writ of habeas corpus shall issue unless within 120 days from the date this Order becomes final the Commonwealth shall have instituted proceedings to retry the petitioner in accordance with principles stated above." Ross v. Ristaino (App. A pp. 15-17).

The Commonwealth then instituted an appeal of Judge Skinner's memorandum and order to the United States Court of Appeals for the First Circuit. On December 31, 1974 the Court of Appeals issued a decision affirming the granting of ROSS' Petition for Writ of Habeas Corpus and stated:

> "On these facts the District Court was not in error in concluding that '(t)he likelihood of infection of the verdict (by racial prejudice) was at least as great as it was in Ham.' In effect the Court held that a black defendant charged with a violent crime against a white security officer would be likely to be a special target of racial prejudice." Ristaino v. Ross, 508 F.2d 754, 756 (Petitioners App. A pp. 21-34, AT 25.

The Commonwealth then filed a Petition for Writ of Certiorari with this Court.

STATEMENT OF THE ISSUE

The sole issue before this Court is whether the United States Court of Appeals for the First Circuit erred in its application of Ham v. South Carolina, 409 U.S. 524 (1973) to the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..."

The Fourteenth Amendment to the United States Constitution provides in part:

> Section 1... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent, JAMES ROSS, JR., was convicted on three indictments (App. A pp. 7, 9, 11), charging him with armed robbery, assault and battery by means of a dangerous weapon, and assault and battery with intent to murder. As a result of these convictions, ROSS received terms of 18 to 30 years for armed robbery (App. A p. 9), 6 to 10 years for assault with a dangerous weapon (App. A p. 7), and 18 to 20 years for assault and battery with intent to murder (App. A p. 11), to be served concurrently at a Massachusetts Correctional Institution.

Before trial, and prior to the impanelling of the jury, each defense counsel submitted motions to the judge which proposed

questions to be asked to the prospective jurors concerning the issue of racial prejudice. (App. B p. 419; App. A pp. 53, 54, 57).

Among those questions submitted to the judge concerning racial prejudice were the following:

Submitted by Counsel for Respondent Ross.

"5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?" (App. A p. 53)

Submitted by Counsel for Co-defendant Roy Daniels.

"3. Do you believe that blacks have a greater propensity for violent or militant behavior than whites?

"4. Over the past years have you noticed a change in the number of crimes being committed in this city?

"6. Has it disturbed you?

"7. Do you feel this increase is due primarily to blacks in the city?

"8. Have you noticed an increased number of blacks and Puerto Ricans coming into your neighborhood?

"9. Have you been disturbed by the changes in your neighborhood?

"10. Have you thought of moving out of it?" (App. A p. 58)

Submitted by Counsel for Co-defendant James Williams.

"10. Would the fact that the defendant is black make it more difficult for you to render a verdict in his favor than if he were white?

"11. If it develops in this case that testimony of black witnesses contradicts the testimony of white witnesses, other things being equal, would you give the testimony of black witnesses and white witnesses equal credit?

"12. Do you have any feelings of prejudices against organizations which support civil rights for members of the black race, such as the National Association for the Advancement of Colored People (NAACP) or the Congress for Racial Equality (CORE) or the Black Panther Party?

"13. Have demonstrations and other activities by blacks in various parts of the United States over the past few years left you with a feeling of hostility toward blacks?

"14. Have you felt in your own mind that black leaders are 'going too far' in their struggle for equal rights? (App. A p. 55)

"15. Have you had an experience involving a black person which left you with a feeling of prejudice concerning members of the black race?

"16. Would the fact that the defendant is a member of a minority group make it more difficult for you to consider the facts objectively and render a verdict in his favor than if he were not a member of such group?

"17. Are there any members of this jury who possess any prejudices with respect to the nationality of any one of the defendants which would prevent you from deciding this case solely on the evidence produced at the trial?

"18. Do you have any feelings either for or against persons of the black race who wear the Afro style haircut and long sideburns?

"19. Are there any members of this jury who possess any prejudice with respect to black people who are involved in causes seeking liberation and justice for black people which would prevent you

from deciding this case solely on the evidence produced at the trial?" (App. A p. 56)

These motions were made and denied (App. A pp. 53, 54, 57). The reason for the judge's refusal to ask any of the proposed questions is contained in the following colloquy:

> THE COURT: "All right. I am going to approach it, as I have said, with all due respect to the problems, and they are important problems which you gentlemen have raised with these several questions which you have asked the Court to put in addition to the usual statutory inquiry, and without going into details as to my reasons, I feel that no purpose would be accomplished by asking such questions in this instance.
>
> There are a number of reasons why I take that position, but they are sound reasons, and the reason I asked you in is that I thought from something Mr. Donnelly said, he might have wanted on the record something which was peculiar to this case, or peculiar to the circumstances which we are operating under here which perhaps he didn't want to say in open court.
>
> Is there anything peculiar about it, Mr. Donnelly?
>
> MR. DONNELLY:[1] No, just the fact that the victim is white, and the defendants are black.
>
> THE COURT: This, unfortunately, is a problem with us, and all we can hope and pray for is that the jurors and all of them take their oaths seriously and understand the spirit of their oath and understand the spirit of what the Court says to them--- this Judge anyway -- and I am sure all Judges of this Court -- would take the time to impress upon them before, during and after the trial, and before their verdict, that their oath means just what it says, that they are to decide the case on the evidence, with no extraneous considerations.
>
> I believe that that is the best that can be done with respect to the problems which -- as I said, I regard as extremely important, but at the same time, my attitude --
>
> MR. DONNELLY: There is only one thing. The only reference I

---

[1]Mr. Donnelly was counsel for Roy Daniels; Mr. Owens was counsel for James Williams and Mr. Newman was counsel for James Ross, Jr.

would make to the facts in this case -- the victim being white, and that he was a security guard in uniform and acting as a policeman.

MR. OWENS: In behalf of James Williams, I have various questions before the Court right now, as to impartiality, and I understand the Court's position, but I would request the Court to just make general inquiry of the entire panel because whenever you have a situation involving black and white, by way of witnesses, a black witness testifying, and black, as to whether or not these jurors are impartial --

THE COURT: Let me say, again with the greatest respect for the problem, which is an acute problem, and always will be an acute problem in the courtroom and in the trial of a case involving possible racial prejudice, but one of the things that I say, and it is not the complete reasoning process that I apply to it in terms of orderly and fair administration of the Court, but one of the things I say is that I would be simply astonished if I ever asked a juror, or a group of jurors, or ever heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one that would admit it.

MR. OWENS: Your Honor, just recently I tried that civil rights case before Judge Julian which lasted four weeks, and some of the same questions we asked the entire panel, and I think 20 raised their hands when the Judge asked them certain questions, if they were biased or prejudiced.

THE COURT: I am astonished at that. It is contrary to all of the experience that I have had.

MR. DONNELLY: I tend to agree with you that people like to be good, and racism is bad, but if you ask people in the community, 'Can you be impartial?' they will say they can be. The thrust of these questions is designed to help the jurors as well as the Court to bring out within themselves the fact that they might not have considered it themselves. (App. B pp. 419-423).

Instead of asking any of the proposed questions or any other question of the court's choosing as to racial prejudice the court addressed the following questions to the jurors as required

by Massachusetts General Laws, Chapter 234, Section 28:

> "If any of you are related to the defendant or the victim?
>
> "If you have any interest in this case?
>
> "If you have expressed or formed an opinion or are sensible of any bias or prejudice?" (App. B. pp. 431, 432).

In addition, the court asked two additional questions; one dealing with whether the jurors or their relations had done police work[2] and the other dealing with whether the jurors would be seriously inconvenienced if they were sequestered for the duration of the trial. (App. B p. 434).

Prospective jurors were excused by the court because of their answers to these questions.[3] At the close of the impanelling of the jury, ROSS, as well as the other two co-defendants, had exhausted their peremptory challenges whereas the Commonwealth had

---

[2]Question: "Are you presently, or have you in the past worked for a police department or a District Attorney's office, or do you have any relative or relatives who is or was engaged in such work?" (App. B p. 423).

[3]Seventeen jurors were excused; two because of admitted prejudice (App. B pp. 440-441, 464), and fifteen because they had already formed an opinion (App. B pp. 437, 470, 471, 480, 499, 525, 538, 539, 540, 542, 501, 503, 504, 519, 520, 521).

thirty-one peremptory challenges left. (App. B p. 547, Commonwealth v. Ross, App. A pp. 38-46 AT 44N.9).

Moreover, prior to the time the prospective jurors were asked the above-mentioned questions the trial judge discussed with each prospective jury panel their obligation to render a fair and impartial verdict based only on the evidence. However, not once during the trial judge's lengthy soliloquy to each panel of prospective jurors did he directly confront the issue of racial prejudice. Rather, he spoke in general terms appealing to the prospective jurors' "intellect and conscience" (App. B p. 433). A representative soliloquy by the trial judge to the juror panel is contained in App. B pp. 429-435.

ROSS' final deliberating jury contained ten (10) whites and two (2) blacks (App. B p. 562, 1372. Commonwealth v. Ross, (App. A pp. 38-46 AT 44). On appeal, ROSS assigned as error the refusal of the trial judge to examine the jurors with respect to racial prejudice and argued that such refusal violated his right to a fair and impartial jury. The Supreme Judicial Court affirmed ROSS' conviction. Petitioner then filed a timely Petition for a Writ of Certiorari to this Court which was granted, judgment vacated and case remanded for further consideration in light of Ham v. South Carolina. After rehearing the Supreme Judicial Court again affirmed ROSS' conviction. ROSS again filed a timely Petition for a Writ of Certiorari to the United States Supreme Court which petition was denied on December 3, 1973, in which

three Justices in a lengthy opinion dissented. (App. A pp. 47-52). ROSS then filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Massachusetts which petition was conditionally granted on June 24, 1974, (App. A. pp. 15-18). An appeal by the Commonwealth of Massachusetts was taken from the conditional granting of ROSS' Petition for Writ of Habeas Corpus to the United States Court of Appeals for the First Circuit which affirmed the granting of ROSS' Petition. Ristaino v. Ross, 508 F.2d 754 (Petitioners App. A pp. 21-34). The Commonwealth then filed a Petition for Writ of Certiorari to this Court.

ARGUMENT

THE JUDGMENT OF THE COURT BELOW UPHOLDING RESPONDENT ROSS' RIGHT TO HAVE THE TRIAL JUDGE EXAMINE PROSPECTIVE JURORS WITH RESPECT TO RACIAL PREJUDICE IS IN CONFORMITY WITH THIS COURT'S DECISION IN HAM V. SOUTH CAROLINA, 409 U.S. 524 (1973).

On December 31, 1974, the United States Court of Appeals for the First Circuit affirmed a decision of the United States District Court for the District of Massachusetts granting ROSS' Petition for Writ of Habeas Corpus and declaring that the trial judges failure to specifically inquire of the prospective jurors as to racial prejudice rises to a level of a constitutional violation requiring ROSS' release or retrial. The First Circuit appears to limit its decision to situations which involve a black criminal defendant charged with a violent crime. They state:

> "On these facts the district court was not in error in concluding that '(t)he likelihood of infection of the verdict (by racial prejudice) was at least as great as it was in Ham.' In effect the court held that a black defendant charged with violent crimes would be likely to be a special target of racial prejudice." (Petitioner's App. A pp. 21-34 AT 25).

On June 24, 1974, the Honorable Walter Jay Skinner, Judge for the United States District Court for the District of Massachusetts, issued a memorandum and order granting ROSS' Petition for Writ of Habeas Corpus based upon the fact that the trial judge erred in not specifically calling to the attention of the prospective jurors the issue of racial prejudice (App. A pp. 15-18 AT 17). Judge Skinner's ruling was made despite the otherwise exemplary conduct of the trial judge and despite the respect which the federal courts owe to decisions of the highest court of a state. He said with regard to Ham v. South Carolina that its true significance is to extend the rule in Aldridge to state court trials (App. A pp. 15-18 AT 16). However, in addition to Judge Skinner concurring with Justices Marshall, Douglas and Brennen that the facts in Ross are "strikingly similar" to those of Aldridge v. United States, 283 U.S. 308 (1931) he said in rendering his opinion in favor of ROSS that:

> "The mandate of Ham is so clear, however, and the rule announced is so fundamental that I have no choice but to enter the following order." (App. A pp. 15-18 AT 17).

On January 17, 1973, this Court decided the case of Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed. 2d 46 (1973). This Court held pursuant to the Due Process Clause of the Fourteenth Amendment, that a black defendant in a state court criminal proceeding is entitled to have the trial judge make inquiry of the prospective jurors as to racial prejudice. Not to do so is a reversible error. 409 U.S. 524, 93 S.Ct. 848, 850 35 L.Ed. 2d 46 (1973).

The Supreme Judicial Court for the Commonwealth of Massachusetts in its decision in Commonwealth v. Ross, 1973 Adv. Sh. 839, 296 N.E. 2d. 810 upheld the trial judge's refusal to ask the following question to the prospective jurors which was submitted by counsel for Respondent ROSS:

> "Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

The Supreme Judicial Court upheld the trial judge's refusal since it believed that Ham was to be limited to its facts and that unless ROSS could show that he was a "special target for racial prejudice," the trial judge was not constitutionally required by Ham to specifically interrogate the prospective jurors as to racial prejudice.[4]

---

[4] 1973 Adv. Sh. 839, ___, 296 N.E. 2d 810, 816.

It is Respondent ROSS' assertion that the Supreme Judicial Court erred in its interpretation of the decision in Ham v. South Carolina as well as its affirmation of his conviction and that this Court should either deny Petitioner's Petition for Writ of Certiorari or grant its Petition and summarily affirm the decision of the United States Court of Appeals for the First Circuit in this case.

The United States Supreme Court in its decision in Ham v. South Carolina, supra, stated that the constitutional stature of the inquiry into racial prejudice is derived from:

> "...the firmly established precedent of Aldridge and the numerous state cases upon which it relied and from the principal purpose as well as from the language of those who adopted the Fourteenth Amendment."[5]

The opinion, written by Mr. Justice Rehnquest, for the unanimous Court in Ham clearly indicates that the rationale for its decision was based upon the purpose and foundation of the Fourteenth Amendment which was to stop invidious discrimination based on racial prejudice.[6] Because of the historical basis of

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[5] 409 U.S. 524, ___, 93 S.Ct. 848, 851, 35 L.Ed. 46, ___. See also Ross v. Ristaino et al (App. A pp. 15-18 AT 16).

[6] ID at 850.

the Fourteenth Amendment to eliminate racial prejudice this Court has recognized that racial prejudice is a paramount factor to be taken into account in criminal proceedings. Nothing in the Ham opinion or the opinions of the district and circuit courts and nothing in the Fourteenth Amendment supports the conclusion that protection is to be limited to "special targets for racial prejudice." The report of the National Advisory Commission on Civil Disorders (1968) commonly referred to as the Kerner Commission Report recognizes the prevalence of racism in our society when it states:

> "Race prejudice has shaped our history decisively in the past; it now threatens to do so again. White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II." (Page 91)

No one can doubt the validity of this statement. In fact, Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennen joined, dissenting in the denial of the Second Petition of Certiorari filed by ROSS states:

> "Finally, to say that petitioner is not a potential target of racial prejudice would be to ignore as judge what we must all know as men. That petitioner was tried in Boston, Massachusetts, while Gene Ham was tried in Florence, South

> Carolina, is of no consequence. Racial prejudice is a cultural malady that has shaped our history as a nation. It is a cancer of the mind and spirit which breeds as prolifically in the industrial cities of the North as in the rural towns of the South." (App. A pp. 47-52 AT 52).

ROSS asserts that to limit the voir dire as to racial prejudice only to "special circumstances"[7] where the defendant is found to be a "special target" for racial prejudice is not to face the reality of our times and in addition to place an undue burden on the defendant to show that he is such a "special target."

As previously mentioned, the decision in Ham relied in part on "the firmly established precedent of Aldridge and the numerous state cases upon which it relied". Aldridge v. United States, 238 U.S. 308, concerned a Negro criminal defendant who was alleged to have murdered a white policeman. Aldridge did not deal with a black defendant who was a "special target" for racial prejudice and no other factors were shown to be present when the United States Supreme Court reversed his conviction. In fact, Mr. Justice Marshall states:

> "The Aldridge Court was not concerned with whether petitioner was unpopular in the community,

[7] 1973 Adv. Sh. 839, 296 N.E. 2d 810, 816.

> a special target of prejudice--but rather with the potential racial 'bias of the particular jurors who are to try the accused.' 283 U.S., at 314. The Court did not rely on any particular circumstances to justify its requirements other than the fact that 'the possibility of prejudice (against Negroes) is (not) so remote as to justify the risk in forbidding the inquiry.' Ibid. Nor did the Court purport to limit its holding to any region because the 'question is not . . . the dominant sentiment of the community . . . ' Ibid. 'In Ham, this Court reaffirmed its commitment to the holding of Aldridge and clarified its constitutional underpinnings. The Court emphasized the compelling nature of an inquiry into racial prejudice--the principal target of the Fourteenth Amendment.'" (App. A pp. 47-52 AT 50).

In Aldridge numerous cases are cited which this Court in Ham cites with approval in which there were no special circumstances, other than the fact that the defendant was a Negro, to require reversal of the defendant's conviction due to the failure of the trial judge to inquire about any racial prejudice the prospective jurors might entertain.

Pinder v. State, 27 Fla. 370, 8 So. 837 (1891) was a case where the defendant, a Negro, was accused of murder. The lower

Circuit Court refused to propound the following question to the prospective jurors:

> "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?"

The Supreme Court of Florida held it was reversal error not to ask the above question. This case presents no special circumstances other than the fact that the defendant was a Negro.

In Hill v. State, 112 Miss. 260, 72 So. 1003 (1916) where the accused, a Negro, was charged with murder of another Negro, all witnesses except one was Negro. Counsel for the defendant propounded the following question to a prospective juror which the lower Court held to be incompetent:

> "Mr. Dillard, have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?"

The Supreme Court of Mississippi reversed the appellant's conviction and stated:

> "...how else could appellant have guarded against race prejudice figuring in the determination

> of his trial than by subjecting the jurors on their voir dire examination to a line of questioning such as was presented to the Court in this instance. It is only by asking questions of the nature of the above question that it is possible for counsel to elicit from the venireman whether or not there exists in his breast race prejudice, perhaps calculated to do the defendant irreparable injury in the trial of his case", 112 Miss. 260, 265.

In State v. McAfee, 64 N.C. 339 (1869) the Supreme Court of North Carolina reversed the rape conviction of a colored man because of the refusal of the trial judge to ask the prospective jurors if:

> "...he believed he could, as a juror, do equal and impartial justice between the State and a colored man".

No special circumstances were present in this case to influence the North Carolina Court to reverse Mr. McAfee's conviction other than the fact that the defendant was a colored man.

It is clear from this Court's decisions in Aldridge and Ham and the numerous cases upon which it relied in making its decision, that the "special target" doctrine advanced by the

Supreme Judicial Court for the Commonwealth of Massachusetts, in the case at bar, finds no support. In fact Mr. Justice Marshall speaking for himself and Mr. Justice Douglas and Mr. Justice Brennen, dissenting from the Court's denial of ROSS' Petition for Certiorari states in regard to the Supreme Judicial Court's decision that Ham was to be limited to those defendants who were a "special target for racial prejudice" that:

> "This distinction is supported by neither logic or precedent." (App. A pp. 47-53 AT 49).

This Court in Ham has stated that in addition to the general questions required by statute to be put to the prospective jurors an additional question or questions must be put to the veniremen,

> "sufficient to focus the attention of prospective jurors to any racial prejudice they might entertain."[8]

Respondent ROSS asserts that the trial judge in the case at bar did not "focus the attention" of the veniremen as to the issue of racial prejudice. ROSS admits the trial judge was concerned about the issue of racial prejudice and regarded it as an important one. Petitioner further admits that the trial judge did speak at length to each panel of prospective jurors about

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[8]409 U.S. 524, ___, 93 S.Ct. 848, 35 L.Ed. 2d 46, ___ (1973).

their duty and obligation to render a fair and impartial verdict. (App. B pp. 429-435) However, not once during the trial judge's soliloquy to the veniremen did he directly confront the issue of racial prejudice.

It is ROSS' contention that the only way to "focus the attention of the prospective jurors as to any racial prejudice they might entertain" is to ask specific questions regarding racial prejudice. The First Circuit, in the case at bar, supports ROSS' assertion. (Petitioner's App. A pp. 21-34 AT 26). Additionally, Judge Skinner of the United States District Court for the District of Massachusetts recognized this fact when in his opinion in Ross he quotes from the case of People v. Reyes., 5 Cal. 347, 349 which is cited by Chief Justice Hughes in Aldridge and concludes:

> "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain whether he is prejudiced or not unless questions similar to the foregoing are propounded to him." (App. A pp. 15-18 AT 17).

Moreover, the Seventh Circuit in United States v. Dellinger, 472 F.2d 340, 367 (1972) spoke to this point by stating:

> "The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices."

It is the essence of fundamental fairness and right to an impartial jury which has led this Court to pronounce that it is imperative to allow the specific question regarding racial prejudice or bias to be asked on voir dire examination.[9]

This Court in Swain v. Alabama notes that the influence of race on jurors is widely explored during voir dire and "that the fairness of trial by jury requires no less." 380 U.S. 202 AT 221 (1965).

> "Merely going through the form of obtaining juror's assurances of impartiality is insufficient . . . (w)hether a juror can render a verdict based solely on evidence adduced in the courtroom should

[9]Aldridge v. United States, 283 U.S. 308 (1931); Swain v. Alabama, 380 U.S. 202 (1965); Dennis V. United States, 339 U.S. 162 (1950).

> not be adjudged on that juror's own assessment of self-righteousness without something more."
> (Emphasis in original.)[10]

Calling for purely subjective responses to general questions is ineffective to test impartiality, and "the defendant in a criminal case has the 'right to probe for the hidden prejudices of jurors.'"[11]

However, the trial judge in the instant case instead of asking any of the defendants' proposed questions as to racial prejudice inquired in a general manner as to bias and prejudice, appealing solely to the jurors' "intellect and conscience" (App. B pp. 431, 433-434). It is obvious that the questions actually asked by the court were ineffective in uncovering the possibility of racial prejudice. In fact, of all the prospective jurors questioned only two were excused because of admitted prejudice (App. B pp. 440-441, 464).

Federal Courts have consistently held that a criminal defendant has a right to examine jurors specifically with respect

[10]Silverthorne v. United States, 400 F. 2d 627, 638-639 (9th Cir. 1968); United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971).

[11]Silverthorne v. United States ID, at 640; See ABA Project on Standards For Criminal Justice, Fair Trial and Free Press, §§2.3, 126-127 (approved draft 1968); See also W. Forsyth, Trial By Jury 175 (1852); Devlin, Trial By Jury 30-31 (1956). Note, Community Hostility and The Right to Impartial Jury, 60 Colum. L. Rev. 349, 354 (1960).

to racial prejudice,[12] and such questions have been widely approved by state courts.[13]

THERE IS NO IRRECONCILABLE CONFLICT BETWEEN THE FEDERAL CIRCUITS SO AS TO REQUIRE THE GRANTING OF THIS WRIT

Since Ham was decided on January 17, 1973, all Courts[14] save three[15] have held that failure to propound questions to

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[12]United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971); United States v. Gore, 435 F. 2d 1110 (4th Cir. 1970); King v. United States, 362 F. 2d 968 (D.C. Cir. 1966); Frasier v. United States, 267 F. 2d 62 (1st Cir. 1959); Smith v. United States, 262 F. 2d 50 (4th Cir. 1959); United States v. Dennis, 183 F. 2d 201, 227, n. 35 (2d Cir.), aff'd 341 U.S. 494 (1951); United States v. Dellinger, 342, F. 2d 340 (7th Cir. 1972).

[13]Gholston v. State, 221 Ala. 556, 130 So. 69 (1930); State v. Higgs, 143 Conn. 138, 120 A 2d 152 (1956); Pinder v. State, 27, Fla. 370, 8 So. 837 (1891); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934); State v. Jones, 175 La. 1014, 144 So. 899 (1932); Giles v. State, 229 Md. 370, 183 A. 2d 359 (1962); Owens v. State, 177 Miss. 488, 171 So. 345 (1930); State v. Pyle, 343 Mo. 876, 123 S.W. 2d 166 (1938); Johnson v. State, 88 Neb. 565, 130 N.W. 282.

[14]See Ristaino v. Ross, 508 F. 2d 754 (1st Cir. 1974); United States v. Robinson, 485 F 2d 1157 (3rd Cir. 1973); Featherston v. United States, 491 F. 2d 96 (5th Cir. 1974); United States v. Ross, 477 F. 2d 551 (6th Cir. 1973); United States v. Power, 482 F. 2d 941 (8th Cir. 1973); United States v. Booker, 480 F. 2d. 1310 (7th Cir. 1973); United States v. Robinson, et al, 495 F. 2d 376, AT 381 (D.C. Cir. 1973).

[15]See United States v. Walker, 491 F. 2d 236 (9th Cir. 1974), cert. den. 416 U.S. 990 (1974) discussed in detail infra; Commonwealth v. Brown, 228 Pa. Super. 166, 323 A. 2d 281 (1974); Commonwealth v. Lumley, 1975 Adv. Sh. 751 (Supreme Judicial Court, Massachusetts, April 7, 1975) in which the Massachusetts Court states:

> "We refuse to follow decision of First Circuit which appears to hold that Ham v. South Carolina, 409 U.S. 521, requires such voir dire in all cases in which a defendant is charged with a violent crime against a white victim."

prospective jurors as to racial prejudice, when requested to do so by a black criminal defendant, is a violation of constitutional dimensions. Of these three courts only one United States Court of Appeals has held that Ham is to be limited to its facts and requires a prior showing that the defendant is a "special target for racial prejudice" before a constitutional right is involved. However, this case, United States v. Walker, 491 F.2d 236 (9th Cir. 1974) cert. den. 416 U.S. 990 (1974) is distinguishable from the case at bar in several material respects:

> FIRST, Walker dealt with the crime of uttering a forged check whereas Ross dealt with the assault by a black man against a white quasi police officer which fact ROSS asserts makes his case, per se, one with racial overtones. It is important to note that the First Circuit in the case at bar limited its holding to violent crimes and did not render any opinion to as crimes such as that involved in Walker.[16]
>
> SECOND, the Court in Walker states that its facts

Continued from previous page

Additionally, they state:

> "(W)e do not believe that the due process clause mandates such examination in every case in which there is a black defendant. We adhere to our prior holdings...that the defendant must be a special target for prejudice before the constitutional guarantees are invoked." (3 Massachusetts Lawyers Weekly 405 April 7, 1975).

are distinguishable from both Aldridge and Ham, whereas the facts in Ross are "strikingly similar" to those in Aldridge (See App. A pp. 47-52 AT 52 and App. A pp. 15-18 AT 17).

THIRD, in reaching its conclusion the Walker Court relied heavily on the Supreme Judicial Court's decision in Commonwealth v. Ross, 296 N.E. 2d. 810 (1973), whereas that decision has been overruled by both the Honorable Walter Jay Skinner (App. A pp. 15-18) and the United States Court of Appeals for the First Circuit (Petitioners App. A pp. 21-34) which decisions the Walker Court did not have the benefit of in making its decision.

FOURTH, in Walker the Court agrees that asking prospective jurors questions as to racial prejudice would be preferable but holds that asking these questions did not rise to the level of an abuse of discretion particularly "in view of the fact that no objection was made to the Court's failure to ask the questions" (491 F.2d. 236, 239). Whereas ROSS strenuously objected to the trial judge's failure to ask his proposed

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[16]Ristaino v. Ross, 508 F. 2d 754, AT 756 (1st Cir. 1974).

questions or those of his co-defendants and the trial judge noted ROSS' exception to his failure to do so.

The case of United States v. Walker is clearly distinguishable from Ross and should not be controlling on this Court's decision. In fact, Respondent asserts that Walker is consistent with First Circuit's decision and, therefore, no conflict exists between any of the Circuit Courts of Appeals which have thus far decided this issue.

FAILURE OF THE TRIAL JUDGE TO EXAMINE THE PROSPECTIVE JURORS REGARDING RACIAL PREJUDICE IS REVERSIBLE ERROR WITHOUT THE NEED TO SHOW ACTUAL PREJUDICE.

This Court in the case of Peters v. Kiff, 407 U.S. 501 (1972) has expressed in clear terms that:

> "a fair trial in a fair tribunal is a basic requirement of due process". (citing In Re Murchison). (AT 501)

While the Kiff decision dealt primarily with the systematic exclusion of blacks from the jury, and raised issues of due process and equal protection, the underlying implication and major thrust of the resolution of the problem was that the right to trial by an impartial jury requires that the jury be selected and comprised of jurors who are capable of rendering a verdict based on the evidence, unfettered by any possible prejudice or bias.

This Court emphasized on page 501 that:

> "Long before this court held that the Constitution imposes the requirement of jury trial on the states, it is well established that the due process clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." and also that:
>
> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." (AT 502)

There is no doubt that the possibility of jurors being racially prejudiced existed and therefore would play a significant role in the disposition of the case at bar.

In the case of United States v. Carter,[17] 440 F.2d 1132 (1971), the Sixth Circuit dealt with the exact issue as was presented in Aldridge and in the present case. In holding that the trial judge committed reversible error by refusing to permit Appellant's counsel to inquire on voir dire examination whether any of the prospective jurors were prejudiced against black

[17] In United States v. Carter 10 of 12 jurors were white as in the present case.

people, the court referred to the language of Aldridge and stated:

> "The argument is advanced on behalf of the government that it would be detrimental to the administration of law in the courts of the U.S. to allow questions to jurors as to racial or religious prejudices. We think it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualifications were barred. No surer way could be devised to bring the process of justice into disrepute." (at 1133 citing Aldridge v. United States 283 U.S. 308 AT 313)

It is up to the trial judge to assure that no prejudice has been fostered. In order to assure the impartiality of the jury, it has been widely held that the trial judge must allow probing questions to jurors on voir dire as to the harboring of a racial bias. The main point is that "the denial or impairment of the right to challenge the jury has been described as 'reversible error without a showing of prejudice'"[18] (emphasis supplied). It should be noted that cases which have construed this particular

[18] Swain v. Alabama, 380 U.S. 202, 219 (1965). See also U.S. v. Booker, 480 F. 2d 1310, (7th Cir. 1973).

issue have consistently held that such error is reversible, for the question is one of denying the petitioner his constitutionally guaranteed right to an impartial jury.[19] Furthermore, in the Kiff case this Court states:

> "Moreover, even if there is no showing of actual bias in the tribunal, this court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." (AT 502)

In essence, it has been impressed upon our judicial system that "circumstances that create the likelihood or appearance of bias" must be dealt with in such a manner as to give assurances to

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[19] U.S. v. Booker 480 F. 2d 1310, (7th Cir. 1973); United States v. Dellinger, 342 F. 2d 340 (7th Cir. 1972).

United States v. Dennis, 183 F. 2d 201, 227 N. 35 (2nd Cir.) aff'd. 341 U.S. 494 (1951); Bailey v. United States, 53 F. 2d 982 (5th Cir. 1931); Smith v. United States, 262 F. 2d 50 (4th Cir. 1931); King v. United States, 362 F. 2d 966 (1966); Silverthorne v. United States, 400 F. 2d 627 (9th Cir. 1968); United States v. Carter, 440 F. 2d 1132 (6th Cir. 1971); United States v. Gore, 435 F. 2d 1110 (4th Cir. 1970); Frasier v. United States, 267 F. 2d 62 (1st Cir. 1959); Kiernan v. Van Schaik, 347 F. 2d 775 (3rd Cir.); Spells v. United States, 263 F. 2d 609 (5th Cir.); Brown v. United States, 338 F. 2d 543 (1964); Gholston v. State, 221 Ala 556, 130 So. 69 (1930); State v. Higgs, 143 Conn. 138, 120 A. 2d 152 (1956); Pinder v. State, 27 Fla. 370, 8 So. 837 (1898); Herndon v. State, 178 Ga. 832, 174 S.E. 597 (1934); State v. Jones, 175 La. 1014, 144 So. 899 (1932); Giles v. State, 229 Md. 370, 183 A. 2d 359 (1962); Owens v. State, 177 Miss. 488, 171 So. 345 (1930); State v. Pyle, 343 Mo. 876, 123 S.W. 2d 166 (1938); Johnson v. State, 88 Neb. 565, 130 N.W. 282 (1911); People v. Decker, 157 N.Y. 186, 51 N.E. 1018 (1898); State v. McAfee, 64 N.C. 339 (1870); Fendrick v. State, 39 Tex. Cr. 147, 45 S.W. 589 (1898).

a criminal defendant placed in this precarious position that due process of law via his right to an impartial jury will be preserved at every stage of the proceedings. The impartiality and integrity of the jury system, the cornerstone of our judicial system, and the defendant's last sanctuary has been subverted in the case at bar.

THE FIRST CIRCUIT IN ROSS DID NOT ERR IN HOLDING THAT HAM V. SOUTH CAROLINA, 409 U.S. 524 (1973) IS TO BE GIVEN RETROACTIVE EFFECT.

The First Circuit Court of Appeals in deciding Ristaino v. Ross stated:

> "Our dissenting brother suggests that the rule of Ham should only apply to cases brought to trial after the date Ham was decided. However, we do not feel the Writ should be denied on the ground that Ham should not be given retroactive application. The Supreme Court implicitly decided that Ham applied to this case when it summarily vacated the judgment of the Supreme Judicial Court of Massachusetts and remanded the case to that Court for reconsideration in light of Ham. See Ross v. Massachusetts, 410 U.S. 901 (1973)."

The Commonwealth in their Petition for Writ of Certiorari at page 6 suggests that there is no support for this inference

drawn by the First Circuit. Respondent disagrees. Ample support for this inference is contained in the case of Fuller v. Alaska, 393 U.S. 80 (1968). Fuller v. Alaska, supra, is similar to the case at bar in that decisions in both cases were rendered by this Court shortly after reversing a criminal conviction and which decisions formulated a new or revised rule of law heretofore not enunciated by this Court. Just prior to deciding the Fuller case this Court had decided Lee v. Florida, 392 U.S. 378 (1968) and held that evidence which was violative of Section 605 of the Federal Communications Act was not admissible in state criminal trials. After deciding Lee v. Florida, supra, this Court granted Petitioner's Petition for Writ of Certiorari and affirmed by stating:

> In Lee v. Florida, 392 U.S. 378, we overruled Schwartz v. Texas and held that evidence violative of §§605 is not admissible in state criminal trials. The decision of the Alaska Supreme Court cannot stand, therefore, if Lee is to be applied retroactively. We hold, however, that the exclusionary rule of Lee is to be given prospective application, and, accordingly, we affirm.
>
> Prospective application of Lee is supported by all of the considerations outlined in Stovall v. Denno, 388 U.S. 293, 297.[1] The purpose of Lee was in no sense to "enhance the reliability of the fact-finding process at trial." Johnson v. New Jersey, 384 U.S. 719, 729. Like Mapp v. Ohio, 367 U.S. 643, Lee was designed to enforce the federal law.[2] Linkletter v. Walker, 381 U.S. 618, 639. And evidence seized in violation of the federal statute is no less relevant and reliable than that seized in violation of the Fourth Amendment to the Constitution. Moreover, the States have justifiably relied upon the explicit holding of Schwartz that such evidence was admissible.
>
> Retroactive application of Lee would overturn

> every state conviction obtained in good-faith reliance on Schwartz. Since this result is not required by the principle upon which Lee was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee.
>
> The petition for a writ of certiorari is granted, and the judgment of the Supreme Court of Alaska is affirmed. 393 U.S. 80 AT 80-81.

Certainly, this Court had every opportunity when ROSS first presented his Petition for Writ of Certiorari to grant his Petition and affirm his conviction and stating that Ham v. South Carolina, supra, was not to be given retrospective application. Therefore, this Court's decision to grant ROSS' first Petition and remand his case to the Supreme Judicial Court for Massachusetts implicity determined that Ham was to be applied retroactively to the case at bar. Furthermore, although the issue of the retroactive[20] application of Ham was not mentioned in either of the Supreme Judicial Court decisions in Ross it was briefed and argued in a case[21] argued and decided on the same day as Ross and

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[20]It is interesting to note that in the five (5) appellate hearings to date held in the case at bar, since Ham was decided, not one line of any brief prepared by the Commonwealth refers to or contests the retroactive application of Ham. The first indication Respondent had that the Commonwealth was raising the issue of Ham's retrospective application was at the oral argument before the United States Court of Appeals for the First Circuit.

[21]See Commonwealth v. Ryles, 296 N.E. 2d 816 (1973) Petition for Habeas Corpus granted subnom Ryles v. Ristaino, __ F. Supp. __ (D. Mass. 1975) (citing Ristaino v. Ross, 508 F. 2d 754 (1st Cir. 1974).

presenting the identical issue. Respondent asserts that the Supreme Judicial Court implicitly decided that Ham was to be given retroactive effect when it rendered its decisions in both the Ross and Ryles[22] cases.

Furthermore, Petitioner in its Petition, page 7, urges this Court to follow its decision in Taylor v. Louisiana and for the same reasons not hold Ham to be retroactive. A distinction can be drawn between the decisions of Taylor v. Louisiana ___ U.S. ___, 43 L.W. 4167 (1975) and Ham v. South Carolina in regard to whether Ham should be given retrospective application. Taylor v. Louisiana, supra, when decided on January 21, 1975 announced a new rule of law, heretofore unstated, that the exclusion of women from jury service denied a defendant's Sixth and Fourteenth Amendment right to an impartial jury trial. Ham, on the other hand, did not announce a new rule of law but rather simply clarified the basis for this Court's decision in Aldridge. Moreover, since Ham, and unlike Taylor, numerous state and federal courts have given ample warnings of the constitutional requirements of asking prospective jurors specific questions as to racial prejudice. The Commonwealth of Massachusetts was not caught off guard by this Court's decision in Ham but has been reluctant to follow its teachings and has shown contempt for this Court's decision in Ham and the decisions of the United States District Court for the District of

[22] ID.

Massachusetts and the United States Court of Appeals for the First Circuit in the case at bar. See Commonwealth v. Lumley, 1975 Adv. Sh. ___, (Supreme Judicial Court, Massachusetts).

Lastly, the Petitioner asserts at p. 9 of its Petition that failure to grant its Petition would "require reversal of every case in the Commonwealth involving a defendant who was a member of a racial minority." Respondent asserts that your Petitioner misreads the First Circuit's decision in Ross.

FIRST, the First Circuit decision does not hold Ham to be "fully retroactive" but only to apply to Ross. It is certainly premature, without further clarification from the First Circuit, to extend its decision in Ross to "all defendants who (are) member(s) of a racial minority." It may well be that when the First Circuit next speaks it will limit its decision in Ross to those cases on appeal at the time of its decision.[23]

SECOND, the First Circuit has limited its decision to convictions involving violent crimes. At least, for the moment, convictions not involving violent crimes will not be afforded the same constitutional protection as that outlined in Ross.

THIRD, Respondent asserts that it is implicit in the decision by the First Circuit that its decision only applies to

[23] This is not an uncommon occurrence. See Linkletter v. Walker, 381 U.S. 618 (1965); Commonwealth v. Arsenault, 233 N.E. 2d 730 (SJC-Mass. 1968).

and affects those criminal defendants who had proposed additional questions to the trial judge as to racial prejudice and the trial judge had refused or neglected to ask these questions or to otherwise "focus the attention of the prospective jurors as to any racial prejudice they might entertain."

Respondent suggests that the number of individuals complying with the aforementioned criteria, although uncertain in number, is, in any event, substantially smaller than the Commonwealth asserts.

CONCLUSION

From the foregoing, it is clear that the United States Court of Appeals for the First Circuit did not err in affirming a decision of the United States District Court for the District of Massachusetts granting Respondent's Petition for Writ of Habeas Corpus based upon the failure of the trial judge to inquire of the prospective jurors specifically as to racial prejudice.

Respondent urges this Court, in the alternative, to either deny Petitioner's Petition for Writ of Certiorari or to grant its Petition and summarily affirm. Failure to do so is,

> " . . . to see (the) decision in Ham v. South Carolina stillborn and to write an epitaph for those 'essential demands of fairness' recognized by (this) Court 40 years ago in Aldridge. (And to) 'bring the processes of justice into disrepute'

> not only by sanctioning the denial of a right required by 'essential demands of fairness' but also in failing to compel compliance by the court below with a precedent of (this) Court barely a year since decided." (App. A pp. 47-52 AT 52).

Respectfully Submitted,

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